INDEX

CITATIONS

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1945

ROSE MARY HASH, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE.

G. LESTER HASH, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Oppie L. Hedrick, on behalf of Rose Mary Hash and G. Lester Hash, hereby prays that Writs of Certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above causes on December 31, 1945, affirming the decisions of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court (R. 165-198) has been reported at 4 T. C. 878. The opinion of the Circuit Court of Appeals (R. 202-209) has been reported at 152 F. (2d) 722.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on December 31, 1945. (R. 209-210, 212). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936.

QUESTIONS PRESENTED

The Petitioners by concurrent declarations of trust, dated September 1, 1940, and May 1, 1941, assigned to their spouse and an attorney as co-trustees interests in two businesses owned by them as equal partners. The assignments were for the benefit of the petitioners' daughters and other specifically named beneficiaries. Simultaneously partnership agreements were entered into with the trustees for the continued operation of the businesses. The income of the trusts is to be currently distributed or to be accumulated in the discretion of the trustees, but corpus and accumulated income are ultimately distributable only to the specifically named beneficiaries. Neither the Petitioners nor the Trustees have any power of revocation nor any power to change either the beneficiaries or their distributive shares. The Petitioners have only a very remotely contingent reversionary interest if both daughters should die and neither one had any issue.

Are the rights retained by the Petitioners in the properties transferred so many, so material and substantial as to render them liable for taxes on the income from the trusteed properties under Sec. 22(a) of the Internal Revenue Code as construed by this Court in *Helvering* v. *Clifford,* 309 U. S. 331?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, infra, PP. 15-25.

STATEMENT

The material facts as shown by the record may be summarized as follows:

The Petitioners are husband and wife (R. 168.) They have two daughters, Rosemary, born in 1924, and Doris June, born in 1926 (R.170). For several years prior to 1940 the Petitioners discussed among themselves the desirability of making some provisions for these daughters (R. 115, 116, 138)). They finally decided upon the creation of separate estates for them. These estates were to be managed for the benefit of the daughters until they could successfully manage their own affairs. In view of the substantial rights vesting in the beneficiaries, the estates should be sufficiently protected against squandering by the daughters themselves, either alone or in conjunction with their prospective husbands.

The principal holdings of the Petitioners were two flourishing businesses, The Hash Furniture Company and The National Finance Company, owned and operated by the Petitioners as equal partners. (R. 101, 135). Of these holdings each one of the Petitioners assigned irrevocably into trust for the benefit of one daughter one-half of his own holdings or one-fourth of their total holdings.

These assignments were made by declarations of trust, dated September 1, 1940, as to the National Finance Company (R. 63-69, 171-177). The assignments as to the Hash Furniture Company were made

by declarations of trust, dated May 1, 1941 (R. 69-77, 77-84). The first trusts were named after the beneficiaries, the second ones after the grantors.

Immediately after each one of the assignments, the Petitioners entered into partnership agreements with the trustees for the continued operation of the businesses. (R. 85-95, 178-186). Each Petitioner appointed as trustees his spouse and a local attorney, requiring unanimous action on their part and providing for settlement of any disputes between them by the local court.

The primary beneficiary of the trusts created by the father is the oldest daughter, Rosemary; the primary beneficiary of the trusts created by the mother is the youngest daughter, Doris June.

The provisions of the separate and irrevocable declarations of trust are essentially as follows: That the daughter shall be the beneficiary both as to corpus and income for the term of her life; that the trustees shall currently distribute to her from either corpus or income such amounts as may be necessary for her maintenance and support, but not for the purpose of discharging any legal obligation of either grantor to furnish such support; that the trustees may terminate the trust and turn over to the beneficiary the corpus and any accumulated income whenever they deem her capable of managing the properties herself; that in the event of the daughter's death prior to termination, her children, if any, shall be next in line; that in the event both daughters died without issue, the trusts should then terminate and the corpus and any accumulated income should go to the grantor's spouse, if living.

In view of the authority given the trustees to ter-

minate the trust at any time, the terms of the trusts were set as long as the rules against perpetuities permitted, except in the event that both daughters died without issue.

To protect the trust estates against alienation, permitted by local law and not prohibited by the instruments, more successfully than it could be done by the discretion of the trustees as to distributions alone, the grantors provided, as an ultimate resort, for the removal of a beneficiary who has proven herself or himself "grossly unworthy". The authority to remove was given to the local court in the second instruments. In the first instruments the authority to remove was originally given to the trustees, but upon application of the grantors the local court took upon itself this power and by decree (R. 58-63) retroactively changed the provisions in the first instruments to conform to those made in the second ones. The succession in case of removal is the same as that provided in case of death.

The trustees were currently credited with their distributive share of partnership profits. (R. 97-98). None of these profits were withdrawn except those necessary to pay income taxes of the trusts. The trustees made no distributions to the beneficiaries who were supported, as before, by their parents from their individual funds.

The businesses continued under the exclusive management of the husband while the wife contributed her full time personal services as before.

The declarations of trust and the partnership agreements were recorded with the Clerk of Raleigh County, West Virginia, and the financial statements of the businesses revealed the change in ownership. Gift tax returns were filed and the gift taxes paid.

The Tax Court found as a fact (R. 197-198) that neither trusts nor partnerships lacked substance or validity, but in its opinion (R. 165-198) concluded, on the basis of numerous inferences drawn from the record, that nothing but legal title was transferred to the trusts, that the grantors could have the beneficiaries changed in a manner which could result in their respective recovery of legal title, that the grantors had a significant reversionary interest and that thus the Petitioners retained such a "bundle of rights" in the corpora of the trusts as to constitute them the substantial owners thereof and taxable on the income therefrom under Sec. 22 (a) of the Code, as construed in *Helvering* vs. *Clifford, supra.*

The Circuit Court of Appeals affirmed the Tax Court by a two to one decision, because the majority believed, that the overall picture gleaned from the record furnished ample support for the inferences drawn by the Tax Court; the majority did not feel justified in holding against these findings of the Tax Court, that the powers lodged in the taxpayers were primarly bottomed in the interests of the beneficiaries, or that the taxpayers divested themselves of all economic benefit or interest in the trust estate or the income therefrom.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the inferences drawn by the Tax Court have substantial support in the record.

(2) In failing to hold that the powers of the trustees are exercisable in the interest of the beneficiaries only.

(3) In failing to hold that the Petitioners have divested themselves of all economic benefit or interest in the trust estate or the income therefrom.

(4) In holding that the Petitioners remained in substance the owners of the corpora of the trusts.

(5) In holding that the income of the trusts is taxable to the Petitioners under Sec. 22 (a) of the Internal Revenue Code.

(6) In affirming the decisions of the Tax Court.

REASONS FOR GRANTING THE WRITS OF CERTIORARI

The reasons for granting the writs in these causes are manifold.

I

THE DECISIONS HERE BELOW ARE IN OPEN CONFLICT WITH VITAL PRINCIPLES APPLIED BY OTHER CIRCUIT COURTS OF APPEALS IN DECISIONS INVOLVING LONG-TERM IRREVOCABLE TRUSTS

The dissenting opinion of Judge Coleman (R. 208-209) with the decisions here below points out a direct conflict with *Armstrong* v. *Commissioner*, 143 F. (2d) 700, which was decided by the Tenth Circuit in favor of the taxpayer on a weaker set of facts that those here involved. The facts here are more akin to those in the *Armstrong* case than to those in *Losh* v. *Commissioner*, 145 F. (2d) 456, which was followed by the majority, despite its conviction, that the present cases are closer to the "dividing line" than the *Losh* case.

This direct conflict becomes more evident yet when vital principles applied by other circuits are compared with the reasoning in the decisions here below.

In *Jones* vs. *Norris*, 122 F. (2d) 6, the Tenth Circuit held that in the absence of powers to revoke or revest, and without a substantial reversionary interest, there could not be sufficient incidents and attributes of ownership to hold the grantor taxable under Sec. 22(a). Absent these same elements, the contrary conclusion was reached below in the present cases.

In *Commissioner* vs. *Branch*, 114 F. (2d) 985, the First Circuit held that a remote reversionary interest does not render the grantor taxable, even if he is trustee with broad powers of management. In the present cases a very remotely contingent reversionary interest was called significant and used to justify taxation to the Petitioners who were neither direct nor sole trustees.

In *Phipps* vs. *Commissioner*, 137 F. (2d) 141, the Second Circuit held that control over the trust within the *Clifford* doctrine could not be based on an assumed disregard of the grantor for the purposes of the trust. The Tenth Circuit, in *Hall* vs. *Commissioner*, 150 F. (2d) 304, held that the proper exercise of a trustee's powers in the interest of the beneficiaries must be presumed. In the present cases, the inferences drawn by the Tax Court and adopted by the Fourth Circuit, are largely based on speculative possibilities that the Petitioners might disregard their duties as trustees and might exercise their powers as trustees for their own selfish benefit.

The duration of the trusts was greatly stressed

by the Tenth Circuit in *Commissioner* vs. *Armour*, 125 F. (2d) 467, and *Commissioner* vs. *Katz*, 139 F. (2d) 107. In the decisions here below the long-term nature of the trusts was entirely ignored.

The Tenth Circuit in *Commissioner* vs. *Buck*, 120 F. (2d) 775, established the requirement of a very substantial measure of control and express reservations of substantial rights to make the *Clifford* doctrine applicable to long-term trusts, a measure of control not necessarily required in a short-term trust. In the present cases, control over long-term trusts was assumed although no express reservations of substantial rights were found or pointed out. The majority opinion, failing to elaborate on the *seratim* treatment of rights, merely admonishes us of their summation, "however slight may be each individual retained right."

In *Jones* vs. *Norris, supra,* the powers of management were discounted because under the terms of the trust both corpus and income were distributable to the beneficiares in person on termination or sooner in the discretion of the grantor. Under identical circumstances undue stress was placed in the present cases not only on the management of the trusts, but likewise on the management of partnerships held othwise substantial and valid. In *Commissioner* vs. *Betts*, 123 F. (2d) 537, the Seventh Circuit at least paid respect to the business ability of the grantor in viewing his investment powers, while in the present cases much ado is being made over the inexperience of an attorney-trustee in the businesses which he is not even expected to manage.

The conflicts herein above set out are submitted as illustrative, but by no means exhaustive.

II

THE DECISIONS BELOW ARE PROBABLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The dissenting opinion of Judge Coleman indicates a probable conflict of the decisions here below with the decision of this Court in *Helvering* vs. *Clifford, supra.* To use the language employed in the minority opinion (R. 208):

> "The opinion in *Helvering* v. *Clifford*, 309 U. S. 331, broad as is its language, should not, I feel, be construed as sweeping into its fold such a situation as that before us."

Later we read again (R. 209):

> "I do not believe that *Helvering* v. *Clifford, supra,* or any decision yet rendered by the Supreme Court, requires us to go this far."

The probability of a conflict between the decisions here below and this Court is further enhanced by the interpretations given the *Clifford* case by other circuits in conflict with the Fourth Circuit as previously set forth in this petition.

The relative weight given by this Court in the *Clifford* case to the term of the trust and the extent of control over the principal appears obviously unbalanced in the decisions here below. It seems that the control over the principal assumed by this Court in the *Clifford* case is largely based, not upon the management powers alone, but upon these powers in conjunction with an absolute reversion of the principal

after a short interim period. Only such combination could produce as its result what this Court called "a temporary reallocation of income." Without such absolute reversion of the principal, the management powers seem of a lesser consequence and the control over the principal becomes sufficiently diluted, particularly in a long-term trust, as not to bring any such case within the orbit of the *Clifford* doctrine.

The probability of a conflict also exists as to this Court's decision in *Helvering* vs. *Stuart*, 317 U. S. 154. The distinction drawn in that case by this Court between economic gain realized or realizable and non-material satisfactions is completely lost in the decisions here below. These decisions do not point out any economic gain realizable by the Petitioners, and on the basis of the record it is hard to see, how any single economic benefit could have been pointed out. Certainly, the mere fact that the profits of the trusts remained in the businesses cannot be used as a basis for assuming economic gain realizable by the Petitioners. Such basis would not only be too weak, but would obviously be in conflict with accepted principles of law which taxes partners on their distributive share of profits, whether distributed or not.

In saying so, we are mindful of this Court's statement in the *Stuart* case, *supra*, at page 168:

> "That economic gain for the taxable year, as distinguished from non-material satisfactions, may be obtained through a control of a trust so complete that it must be said the taxpayer is the owner of its income."

But the improbability, though not absolute impossibility of reversion, the fact that corpus and accumulated income of either partnerships or trusts are ul-

timately distributable only to the specifically named beneficiaries strongly point in the other direction and to a probable conflict of the decisions below with the applicable decisions of this Court.

III

THE IMPORTANCE OF THE QUESTION INVOLVED CALLS FOR THE VIEWS OF THIS COURT IN THE INTEREST OF A MORE STABLE JURISDICTION AND TAX ADMINISTRATION

Flushed by his victory in the *Clifford* case, the Commissioner immediately embarked upon a vigorous campaign designed to practically exterminate for tax purposes all trusts. These tendencies were early recognized by the First Circuit and referred to in *Commissioner* v. *Branch, supra,* with these words at page 986:

> ". . . . we are asked to press on beyond *Helvering* v. *Clifford,* 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788, and to apply the rationale of that striking case to a much weaker set of facts."

These attempts at an apparently unwarranted expansion of the *Clifford* doctrine have created considable confusion and started a flood of litigation. Eminent authorities in the field of Federal Income Taxation became alarmed over the results. We like to refer to an article by Roswell Magill, published, concurrently with the Columbia Law Review, in Taxes, The Tax Magazine, Vol. 23, No. 4, April 1945, and the authorities cited therein.

This confusion has reached deep down, as the vigorous dissent of Judge Coleman with the decisions

below amply illustrates. It is not limited to the Fourth Circuit either.[1])

In *Commissioner v. Bateman,* 127 F. (2d) 266, the First Circuit admits to it by saying, at page 271:

> "Frankly, we do not know how the Supreme Court would apply the general criteria of the Clifford case to the facts now befor us."

In *Suhr* v. *Commissioner,* 126 F. (2d) 283, the Sixth Circuit expresses itself as follows at page 287:

> ". . . . our trouble arises from the fact that precise standards or guides not only are absent from the statute or appropriate regulations but that the Court, in its effort to supply the omission, has found itself likewise unable to give us definite charts of the road to judgment. . . ."

We feel that this Court is in a position to furnish us more definite standards as to the rationale of the *Clifford* case and that the time for an amplification of its views has come. More than six years have expired since this Court has authoritatively spoken on the subject. In those years many principles have reached the crystalization stage in the conflicting decisions of the lower courts. The authority of this Court could now put to rest the unending controversy, thus stabilizing the jurisdiction of the lower courts and stopping the flood of litigation.

This task should not be left to the Commissioner who has just recently assumed it by issuing new regulations. (Reg. 111, Sec. 29, 22 (a)-21, as added by

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1) It is admitted by the Commissioner himself in his regulations, referred to below. (Appendix, Page 16).

T. D. 5488, Dec. 29, 1945, R. 15ff). These regulations are in sharp contrast to the administrative practices up to now, despite the professed intention of applying them to taxable years beginning prior to January 1, 1946. They clearly reveal and admit the attempt of the Commissioner to settle the controversy over the *Clifford* doctrine on his part ,thereby assuming a function which is within the province of this Court.

CONCLUSION

Wherefore it is prayed that this petition for Writs of Certiorari be granted.

OPPIE L. HEDRICK,
Counsel for Petitioners.

March 1946

APPENDIX

Revenue Act of 1938, c 289, 52 Stat. 447:

SEC. 22. GROSS INCOME

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

Reg. 111, as added by T. D. 5488, Dec. 29, 1945:

Sec. 29.22(a)-21. TRUST INCOME TAXABLE TO THE GRANTOR AS SUBSTANTIAL OWNER THEREOF.—(a) *Introduction.*—Income of a trust is taxable to the grantor under section 22(a) although not payable to the grantor himself and not to be applied in satisfaction of his legal obligations if he has retained a control of the trust so complete that he is still in practical effect the owner of its income. (*Helvering* v. *Clifford,* 309 U. S. 331). In the absence of precise guides supplied by an appropriate regulation, the application of this principle to varying and

diversified factual situations has led to considerable uncertainty and confusion. The provisions of this section accordingly resolve the present difficulties of application by defining and specifying those factors which demonstrate the retention by the grantor of such complete control of the trust that he is taxable on the income therefrom under section 22 (a). Such factors are set forth in general in subsection (b) and in detail in subsections (c), (d), and (e), below.

(b) *In general.*—In conformity with the principle stated in subsection (a) above, the income of a trust is attributable to the grantor (except where such income is taxable to the grantor's spouse or former spouse under section 22 (k) or 171) if—

(1) the corpus or the income therefrom will or may return after a relatively short term of years (see subsection (c))

(2) the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition (other than certain excepted powers), whether by revocation, alteration, or otherwise, exercisably by the grantor, or another person lacking a substantial adverse interest in such disposition, or both (see subsection (d)); or

(3) the corpus or the income therefrom is subject to administrative control, exercisable primarily for the benefit of the grantor (see subsection (e))

(c) *Reversionary interest after a relatively short term.*—Income of a trust is taxable to the grantor where the grantor has a reversionary interest in the corpus or the income therefrom which will or may reasonably be expected to take effect in possession or enjoyment—

(1) within 10 years commencing with the date

of transfer, or

(2) within 15 years commencing with the date of the transfer if the income is or may be payable to a beneficiary other than a donee described in section (23) (o) and if any one or more of the following powers of administration over the trust corpus or income are exercisable solely by the grantor, or spouse living with the grantor, or both, whether or not exercisable as trustee; a power to vote or direct the voting of stock or other securities, a power to control the investment of the trust funds either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, and a power to reacquire the trust corpus by substituting other property, whether or not of an equivalent value.

Where the grantor's reversionary interest is to take effect in possession or enjoyment by reason of some event other than the expiration of a specific term of years, the trust income is nevertheless attributable to him if such event is the practical equivalent of the expiration of a period less than or equal to 10 or 15 years, as the case may be. For example, a grantor is taxable on the income of a trust if—

(A) the corpus is to return to him or his estate on the death of a person whose life expectancy is six years at the date of the transfer in trust; or

(B) the corpus is to return to him or his estate on the graduation from college or prior death of his son, who is 18 years of age at the date of the transfer in trust.

In general ,a reversionary interest may reasonably be expected to take effect in possession or enjoyment within 10 or 15 years, as the case may be, where the

corpus or the income therefrom is to be reacquired if the grantor survives any stated contingency which is of an insubstantial character. Thus, the grantor is taxable where the trust income is to be paid to the grantor's wife for three years, and the corpus is then to be returned to the grantor if he survives such period, or to be paid to the grantor's wife if he is already deceased.

Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest is considered a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. But income for any period shall not be taxable to the grantor by reason of the preceding sentence if such income would not be taxable to him in the absence of such postponement.

Example. A places property in trust for the benefit of his son B. Upon the expiration of 12 years or the earlier death of B the property is to be paid over to A or his estate. Neither A nor his wife has any power of administration over the trust corpus or income. After the expiration of nine years A extends the term of the trust for an additional two years. A is considered to have made a new transfer in trust for a term of five years. He is not taxable on the income for the first three years of such term because he would not be taxable thereon if the term of the trust had not been extended. A is taxable, however, on the income for the remaining two years.

(d) *Power to determine or control beneficial enjoyment of income or corpus.*—Income of a trust is taxable to the grantor where, whatever the duration of the trust, the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition

(except as provided in section 167(c) and as hereafter provided in exceptions (1) to (5), inclusive), whether by revocation, alteration, or otherwise, exercisable (in any capacity and regardless of whether such exercise is subject to a precedent giving of notice or is limited to some future date) by the grantor, or any person not having a substantial adverse interest in the beneficial enjoyment of the corpus or income, whichever is subject to the power, or both. The grantor is not taxable, however, if the power, whether exercisable with respect to corpus or income, may only affect the beneficial enjoyment of the income for a period commencing more than 10 years from the date of the transfer (or 15 years where any power of administration specified in subsection (c) is exercisable solely by the grantor, or spouse living with the grantor, or both, whether or not as trustee). For example, if a trust created on January 1, 1940, provides for the payment of income to the grantor's wife, and the grantor does not reserve any such administrative power but reserves the power to substitute other beneficiaries in lieu of his wife on or after January 1, 1950, the grantor is not taxable on the trust income for the period prior to January 1, 1950. But the income will be attributable to the grantor for the period beginning on such date unless the power is relinquished. If the beginning of such period is postponed, such postponement is considered a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. But income for any period shall not be taxable to the grantor by reason of the preceding sentence if such income would not be taxable to him in the absence of such postponement. Where the income

affected by the power is for a period beginning by reason of some event other than the expiration of a specific term of years, the grantor will be taxable if such event is the practical equivalent of the expiration of a period less than or equal to 10 or 15 years, as the case may be, in accordance with the criteria stated in subsection (c).

This subsection shall not apply to any one or more of the following excepted powers:

(1) a power exercisable only by will, other than a power in the grantor to appoint the income of the trust where the income is accumulated for such disposition by the grantor, or may be so accumulated in the discretion of the grantor, or any perosn not having a substantial adverse interest in the disposition of such income, or both. For example, if a trust provides that the income is to be accumulated during the grantor's life and that the grantor may appoint the accumulated income by will, the grantor is taxable on the trust income;

(2) a power to determine the beneficial enjoyment of the corpus or the income therefrom if such corpus or income, as the case may be, is irrevocably payable for the purposes and in the manner specified in section 23 (o);

(3) a power which merely enables the grantor or another person to distribute or apply income to or for a current income beneficiary or to accumulate such income for him, provided that any accumulated income must ultimately be payable to the beneficiary from whom distribution or application is withheld, or, if payable upon the complete termination of the trust or in conjunction with a distribution of corpus which distribution is

augmented by such accumulated income, is ultimately payable to the current income beneficiaries in shares which have been irrevocably specified in the trust instrument. Accumulated income shall be considered so payable although it is provided that if any beneficiary does not survive the date of distribution, the share of such deceased beneficiary is to be paid to a designated alternate taker, other than the grantor or his estate, if such date may reasonably be expected to occur within the beneficiary's lifetime, and if the share of such alternate taker has been irrevocably specified in the trust instrument;

(4) a power which merely enables the grantor or another person to pay out corpus to or for a current income beneficiary, provided that any such payment of corpus must be chargeable against the proportionate share of corpus held in trust for the payment of income to such beneficiary as if such corpus constituted a separate trust, or provided that the power is limited by some reasonably definite external standard. For the requirements of such standard, see exception (5);

(5) a power to apportion income (whether by distribution or accumulation) to or within a class of beneficiaries if such power is exercisable exclusively by a trustee other than the grantor or spouse living with the grantor and its exercise is not subject to the approval or consent of any person other than such trustee and is limited by some reasonably definite external standard. Such standard must be set forth in the trust instrument, must consist of the needs and circumstances of the beneficiaries within the class, and must be susceptible of enforcement by

a court of equity. For example, a provision authorizing the payment of income to members of a class in such amounts as the trustee shall determine wise and proper in the exercise of his honest discretion, or in such amounts as the trustee determines to be in the best interests of the beneficiaries, does not meet the requirements of the external standard contemplated by this exception. Nor does a power to appoint within a class of beneficiaries fall within this exception if the trustee is enabled to add to or eliminate from the class of beneficiaries designated to receive the income except in so far as provision may be made for after-born children.

The application of this exception may be illustrated by the following examples, in which it is assumed that the trustee is neither the grantor nor his wife:

Example (1). A transfers property to X as trustee to pay the income in equal shares to B, C, and D, the grantor's three sisters. In any year, however, X may distribute to any one sister an amount not to exceed 60 per cent of the income for that year, provided that the needs of such sister in the particular year, due to illness or poor financial circumstances, are proportionately greater than those of the other sisters. The income of the trust is not taxable to the grantor by reason of such limited power in the trustee. Such income, however, would be taxable if the exercise by X of his power of distribution were not dependent upon the needs of the sisters.

Example (2). A transfers property to X as trustee to pay A's wife such part of the income as X may consider wise and proper for the comfort and happiness of the wife and to pay the balance of the income

to A's son. The income is taxable to the grantor since the power to apportion income is not limited by any reasonably definite external standard.

A mere power to allocate receipts as between corpus and income, even though expressed in broad language, is not deemed a power over beneficial enjoyment with respect to income or corpus.

(e) *Administrative control.*—Income of a trust, whatever its duration, is taxable to the grantor where, under the terms of the trust or the circumstances attendant on its operation, administrative control is exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust. Administrative control is exercisable primarily for the benefit of the grantor where—

(1) a power exercisable by the grantor, or any person lacking a substantial adverse interest in its exercise, or both, whether or not in the capacity of trustee, enables the grantor or any person to purchase, exchange, or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate and full consideration in money or money's worth; or

(2) a power exercisable by the grantor, or spouse living with the grantor, or both, whether or not in the capacity of trustee, or exercisable by any other person in a nonfiduciary capacity, or by such person and either of the foregoing, or both, enables the grantor to borrow such corpus or income, directly or indirectly, whether with or without adequate security or interest; or

(3) a power exercisable in a fiduciary capacity by a person other than the grantor or spouse living with the grantor enables the grantor to borrow such

corpus or income, directly or indirectly, and such power has been exercised and the grantor has not completely repaid the loan, including any interest, before the beginning of the taxable year; or

(4) any one of the following powers of administration over the trust corpus or income is exercisable by any person in a nonfiduciary capacity: a power to vote or direct the voting of stock or other securities, a power to control the investment of the trust funds either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, and a power to reacquire the trust corpus by substituting other property, whether or not of an equivalent value.

If a power is exercisable by a person as trustee, it is presumed that the power is exercisable in a fiduciary capacity primarily in the interests of the beneficiaries. Such presumption may be rebutted only by clear and convincing proof that the power is not exercisable primarily in the interests of the beneficiaries. If a power is not exercisable by a person as trustee, it is presumed that the power is exercisable in a nonfiduciary capacity. But such presumption may be rebutted if it appears, from all the terms of the trust and the circumstances surrounding its creation and administration, that the power is exercisable primarly in the interests of the beneficiaries.

The mere fact that a power exercisable by the trustee is described in broad language does not indicate that the trustee is authorized to purchase, exchange, or otherwise deal with or dispose of the trust property or income for less than an adequate and full consideration in money or money's worth. On the other hand, such authority may be indicated by the

actual administration of the trust.

(f) *Limitations of section.*—Despite the limitations of this section, the grantor of a trust directing the payment or application of the income therefrom in satisfaction of the grantor's legal obligations shall continue to be taxable on the income. The grantor may also be taxable on the income of a trust on the ground that such income is attributable to him in a capacity unrelated to dominion and control over the trust as such as defined in subsections (c), (d), and (e) of this section. Thus, the provisions of this section do not affect the principles governing the taxability of future income to the assignor thereof whether or not the assignment is by means of a trust. Nor, for example, do the provisions of this section affect the applicability of section 22(a) to the creator of a family partnership. See further sections 166 and 167.

Section 22(a) shall be applied in the determination of the taxability of trust income for taxable years beginning prior to January 1, 1946, without reference to this section.

INDEX

CITATIONS

In the Supreme Court of the United States

October Term, 1945

No. 1016

Rose Mary Hash, petitioner

v.

Commissioner of Internal Revenue

No. 1017

G. Lester Hash, petitioner

v.

Commissioner of Internal Revenue

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 165–198) is reported at 4 T. C. 878. The opinion of the Circuit Court of Appeals (R. 202–208) and the dissenting opinion (R. 208–209) are reported at 152 F. 2d 722.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 31, 1945. (R. 209, 212.) The petition for writs of certiorari was filed March 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in sustaining the Tax Court's decision that income attributed by taxpayers to trusts for their daughters under so-called partnership agreements was includible in taxpayers' gross income as defined by Section 22 (a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra.*

STATEMENT

The material facts found by the Tax Court (R. 168–191) may be summarized as follows:

Taxpayers, husband and wife, have been business partners since shortly after their marriage. At the time of the transactions here involved they owned and operated as equal partners two flourishing businesses, one a furniture and clothing business known as the Hash Furniture Company and the other a finance business known as the National Finance Company. (R. 168–170). They have two minor daughters, Rosemary and Doris. After discussing with their accountant and their

attorney, Mann, the tax aspects of trusts in favor of the daughters, taxpayers on September 1, 1940 each executed an "Assignment and Declaration of Trust". The instruments were identical except that the one which the husband executed named the wife and Mann as trustees, the daughter Rosemary as primary beneficiary, and the wife as contingent beneficiary; while the one which the wife executed named the husband and Mann as trustees, the daughter Doris as primary beneficiary, and the husband as contingent beneficiary. (R. 170–171.) By these instruments, which were acknowledged and recorded, taxpayers purported to convey to the trusts one-half of their respective one-half interests in the National Finance Company. (R. 171–176.) On May 1, 1941 taxpayers each executed similar cross-trusts, this time covering one-half of their respective one-half interests in the Hash Furniture Company. (R. 186–187.) Gift tax returns were filed and the gift taxes paid. (R. 189.) On the same days that the trust instruments were executed taxpayers as individual partners entered into "partnership agreements" with themselves and Mann as trustees for the daughters; these provided that the businesses were thereafter to be conducted by taxpayers individually and the two trust estates as equal partners. (R. 178–187.) Each trust and partnership agreement to which it became a party was executed simultaneously and as part of a single transaction. (R. 191–192.)

After the execution of the foregoing instruments taxpayers continued to operate the businesses identically as before. Their daughters were schoolgirls, with no business experience, and contributed no services. Mann, the co-trustee named in the instruments, is the attorney retained by taxpayers to advise them concerning the plan and who prepared the documents. He is without experience in the businesses, and his activities as trustee have been limited to routine matters, such as endorsing and mailing checks and signing income tax returns for the trusts prepared by taxpayers' tax consultant. (R. 187–188.)

None of the business income allocated to the trusts has been distributed to the trusts or beneficiaries, but all has been retained and used in the businesses. (R. 189, 193.)

Following execution of the instruments, new books of account for the National Finance Company and the Hash Furniture Company were set up, and partnership returns were filed for each company on the basis of the fiscal years provided for in the new partnership agreements. In their individual income tax returns for the taxable years taxpayers did not include in their distributive shares the portions of the partnership net income attributed to the trusts. (R. 188–189.) The Commissioner disregarded the new partnership arrangement both for purposes of determining the owners of the businesses and the reporting

period of the old partnerships, and determined deficiencies against taxpayers for the taxable years. (R. 21–24, 43–47, 189.) The Tax Court sustained the Commissioner's determination that the entire business income remained taxable to taxpayers, but rejected his determination that the arrangement was ineffectual to change the tax years of the old partnership. (R. 191–198.) The Circuit Court of Appeals affirmed, District Judge Coleman dissenting. (R. 202–209.)

ARGUMENT

There is no occasion for further review. The disposition of these cases is controlled by *Commissioner* v. *Tower* and *Lusthaus* v. *Commissioner,* decided by this Court February 25, 1946, Nos. 317 and 263, not yet reported, with which the decisions below are in accord.

1. The question in these cases is the same as in *Commissioner* v. *Tower* and *Lusthaus* v. *Commissioner, supra.* The fundamental principles which this Court there held to be determinative of the federal income tax effect of family partnerships erected upon gifts are not any the less applicable where, as here, the gifts are in trust and the accompanying partnership agreements are with the trustee. The critical inquiry is whether the arrangement—whatever its legal cast—results in an actual change in the creation or control of the business income, or merely a reallocation of the income within the donor's

family. So tested, whether the claimed partnership has reality for federal income tax purposes presents a question for the Tax Court, whose conclusion is entitled to finality if supported by evidence.

The evidentiary support for the Tax Court's conclusion (R. 196) that the arrangement here "worked no substantial change in the economic status" of taxpayers is as potent as that which this Court held required affirmance of its like inferences in the *Tower* and *Lusthaus* cases. The cross-trusts and simultaneous "partnership agreements" between taxpayers individually and themselves (and Mann) as trustees for their daughters were intended as component parts of one transaction. (R. 191–192.) While the verbal ritual employed sufficed to alter naked legal rights, it produced no change in the management or conduct of the businesses, or the earning of the income in question. (R. 187–188, 194.) The trusts became "partners" in name, not in fact. Neither new capital nor additional services were brought into the businesses. Nor does the record disclose any business purpose to be served by the arrangement. In the *Tower* and *Lusthaus* cases this Court considered such features ample basis for the Tax Court's conclusion that the gifts and partnership agreements there involved, though formally perfect, were without federal income tax significance. The decisions below are

fortified by an additional factor, not present in either the *Tower* or *Lusthaus* case; the shares of the business income here attributed to the trusts as "partners" were not distributed, but were retained and used by taxpayers in the businesses. (R. 189, 193–194.) They thus continued to enjoy control over the income, as well as the principal, of the partnership interests they purported to give away. Affirmance of the Tax Court's decisions by the court below was clearly consonant with established rules, reiterated by this Court in the *Tower* and *Lusthaus* cases, governing the scope of appellate review of Tax Court decisions.

2. Taxpayers do not and cannot assert conflict with the controlling decisions of this Court in the *Tower* and *Lusthaus* cases. Isolating the trusts from the concurrent partnership agreements, they rely for conflict upon decisions of Circuit Courts of Appeals in cases "involving long-term irrevocable trusts". (Pet. 7.)[1] With the exception of *Armstrong* v. *Commissioner,* 143 F. 2d 700 (C. C. A. 10th), the cases relied upon

[1] Even if these cases be viewed in that distorted posture, there is no basis for taxpayers' assumption that the length of the period for which a grantor has parted with legal title is decisive of whether he has also parted with substantial economic ownership during the taxable year; the duration of the trust is but one of many factors to be considered by the fact-finding tribunal. *Helvering* v. *Clifford*, 309 U. S. 331, 336–337; *Stockstrom* v. *Commissioner*, 148 F. 2d 491 (C. C. A. 8th), certiorari denied, October 8, 1945; *Miller* v. *Commissioner*, 147 F. 2d 189 (C. C. A. 6th).

(Pet. 7–9, 13) do not involve family partnerships. Moreover, the *Armstrong* case was distinguished by the court which decided it in *Losh* v. *Commissioner,* 145 F. 2d 456, whose factual pattern resembles that of the instant cases; any remnant of its vitality which may have survived the *Losh* case appears to have been extinguished by the still later decisions of the same court in *Grant* v. *Commissioner,* 150 F. 2d 915, and *Bradshaw* v. *Commissioner,* 150 F. 2d 918. See also *Earp* v. *Jones,* 131 F. 2d 292, certiorari denied, 318 U. S. 764. In any event, whatever conflict in the field of "family partnership" cases existed among (or within) the circuits prior to this Court's decisions in the *Tower* and *Lusthaus* cases has now been authoritatively resolved by those decisions.

3. Taxpayers' assertion (Pet. 10, 12) that the decisions below "probably" conflict with and represent an "unwarranted expansion" of the principles of *Helvering* v. *Clifford,* 309 U. S. 331, is patently untenable in view of this Court's application of those principles, in the *Tower* and *Lusthaus* cases, to the very type of situation here presented. Nor is there anything in *Helvering* v. *Stuart,* 317 U. S. 154, with which taxpayers likewise assert "probability" of conflict (Pet. 11), which might be construed as departing from the basic principles enunciated in the *Clifford* case and implemented in the *Tower* and *Lusthaus* cases.

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
J. LOUIS MONARCH,
HARRY BAUM,
Special Assistants to the Attorney General.

APRIL 1946.

APPENDIX

Internal Revenue Code:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.

(26 U. S. C. 11).

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 22).

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U. S. C. 181).

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the

partnership, computed as provided in section 183 (b).

(26 U. S. C. 182).

SEC. 183. COMPUTATION OF PARTNERSHIP INCOME.

(a) *General rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b) and (c).

(26 U. S. C. 183).

SEC. 188. DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner.

(26 U. S. C. 188).

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner"

> includes a member in such a syndicate, group, pool, joint venture, or organization.
>
> * * * * *

(26 U. S. C. 3797).

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.22 (a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1948

26

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

NO. 1016
ROSE MARY HASH, Petitioner
Vs:
COMMISSIONER OF INTERNAL REVENUE
NO. 1017
G. LESTER HASH, Petitioner,
Vs:
COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS IN SUPPORT

OPPIE L. HEDRICK
Counsel For Petitioners

INDEX

Citations:

Cases:

Regulations:

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Commissioner of Internal Revenue.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS IN SUPPORT

The Petition set forth three principal reasons for granting the writs:

(1) The conflict of the decisions below with vital principles applied by other Circuit Court of Appeals as to long-term irrevocable trusts.

(2) The probability of a conflict with the applicable decisions of this Court.

(3) The desirability of obtaining this Court's

views in the interest of a more stable jurisdiction and tax administration.

All three reasons are tacitly admitted by the respondent's brief; the last one by simply ignoring it, the other two by sidestepping the real issue.

The real issue is the taxability of trust income under the doctrine of *Helvering v. Clifford,* 309 U. S. 331, Not in issue is the substance and validity of a family partnership.

The substance and validity of the partnerships involved in the present cases has been expressly recognized by the Tax Court's clear findings of fact (R.197-198). These findings are entitled to finality. They should be recognized by the respondent as they were by the Circuit Court of Appeals.

The decisions below, both in the Tax Court and the Circuit Court of Appeals, invoked this Court's decision in the *Clifford* case. In both courts below the issue was clearly framed. It needs no reframing here. Such reframing is attempted in the respondent's brief by shielding behind the cases of *Commissioner v. Tower* and *Lusthaus v. Commissioner,* decided by this Court on February 25, 1946.

These cases involved the validity and substance of family partnerships which are not in issue here. Were they in issue, it would have been easy for the Tax Court to make an appropriate finding to that effect rather than the finding it did make.

For this reason the *Tower* and the *Lusthaus* cases are neither controlling nor conflicting. Gifts into trust do not establish a *fortiore* as to the validity of a

family partnership. Neither does the imposition of a family partnership upon a trust substract from its character as such. This character is retained whether the corpus be cash, securities or a partnership interest.

The taxability of the trust income is to be viewed, therefore, in the light of the *Clifford* case, as it was done by both courts below. It is not to be viewed in the light of the *Tower* and *Lusthaus* cases, as the respondent would want us to do.

Viewed in the light of the *Clifford* case, the conflicts asserted in the petition do exist. They are not repudiated by the respondent, but rather tacitly admitted.

Viewed in this light, the probability of a conflict with the applicable decisions of this Court also exists. In this respect the measured dissent of Judge Coleman appears entitled to greater weight than the unsupported contentions of the respondent.

The respondent's failure to discern the possibility of a conflict with this Court as to the distinction between "economic gain" and "non-material satisfactions" in the case of *Helvering v. Stuart,* 317 U. S. 154, should not be of much concern either. This failure admits his inability of pointing out any economic gain realizable by the petitioners.

Under these circumstances, the reluctance of the respondent to even discuss the third reason advanced in the petition becomes more understandable. Now the respondent cannot see any need for resolving the confusion which he himself has termed "considerable" in his Regulations (Pp. 15 - 25 of the Appendix to the

Petition). The respondent seems satisfied with the result of the judicial function assumed by him through the issuance of the Regulations referred to. . By omitting them from the Appendix of his own brief, he presumably shows his reluctance, however, to have them applied to the cases at bar. This finds its explanation in the *reservatio mentalis* made in those Regulations as to the creator of a family partnership (P. 25 of the Appendix to the Petition).

By evading the real issue, the respondent renders support rather than opposition to the reasons advanced by the petition for granting the writs.

Wherefore it is prayed again that such writs issue to the Circuit Court of Appeals of the Fourth Circuit.

Oppie L. Hedrick,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 1016

Rose Mary Hash, Petitioner

Vs:

Commissioner of Internal Revenue

NO. 1017

G. Lester Hash, Petitioner

Vs:

Commissioner of Internal Revenue

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Rose Mary Hash and G. Lester Hash, pray that this Court rehear and reconsider its denial of the petitioner's petition for the issuance of writs of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit in the above entitled cases.

On March 29, 1946, your petitioners filed with your Honorable Court a petition for writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in the above styled cases.

The Respondent filed its brief in opposition with your Honorable Court on April 19, 1946.

Your petitioners filed their reply brief with your Honorable Court on April 29, 1946.

On May 6, 1946, your Honorable Court refused the writs of certiorari.

The history of the case, the questions presented, the statutes and regulations involved, the specifications of errors and the reasons for granting the writs are all set forth in the petition for certiorari, the brief in support thereof and the reply brief in support, to which reference is made and will not be repeated here.

GROUNDS FOR GRANTING THE PETITION

1. THE NET RESULT OF THE DECISIONS BELOW WILL BE A CONFISCATION OF PROPERTY WHICH CANNOT BE JUSTIFIED UNDER ANY INCOME TAX STATUTE.

Your Petitioners feel that a gross inequity is being imposed upon them which may not have been viewed by this Court in its consideration of the Petition for Writs of Certiorari.

Under the decisions below the Petitioners are being taxed on twice the amount of income to which

they are entitled under state law in view of covenants made by them.

The Petitioners cannot legally invade the corpus or income of the trusts created.

Since these trusts are equal partners in valid partnerships and are entitled to the same share of income as the Petitioners, the inclusion of the trust income makes the taxable income of the petitioners twice the amount of their legal income.

The income tax of the Petitioners will therefore be in excess of the income, to which they are legally entitled, as soon as the composite rate of tax exceeds fifty per cent of the taxable income. At the present rates of tax, the Petitioners are and will be subject to a composite rate in excess of fifty per cent of their taxable income. The income tax will thus exceed the income to which they are legally entitled under local property laws. Under these laws they have no recourse against the trusts for the taxes paid. *The net result of the decisions below is therefore a confiscation of property which cannot be justified under any income tax statute, no matter which doctrine of Federal income taxation may be applied.*

Congress never could have intended such a result and no interpretation of the statute enacted by Congress can reasonably produce such effect.

There is a very grave and important question of federal law raised hereby which likely has not been considered by this Honorable Court in the refusal to review the decisions of the Circuit Court of Appeals

for the Fourth Circuit.

A reconsideration from this angle alone, seems, therefore, fully justified and highly desirable.

II. REGULATIONS ISSUED BY THE COMMISSIONER AS TO THE TAXATION OF TRUST INCOME HAVE NOT BEEN APPLIED IN THE CASES AT BAR, ALTHOUGH THEY ARE SUPPOSEDLY RETROACTIVELY APPLICABLE TO TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 1946.

If these regulations were applied sub-section by sub-section to the facts in the present cases, no other holding could be made than that the Petitioners as grantors are not taxable on the income of the trusts.

If these regulations really are a proper restatement of existing law, then the holding in the decisions below should be reconcilable with the regulations. If the decisions below are not reconcilable with these regulations, then such regulations are not a proper restatement of existing law and should be wholly or partially voided; or the decisions below are not in keeping with existing law and should be reviewed.

We do not want to burden the Court with a lengthy enumeration of the conflicts between these regulations and the decisions below, but we feel that a thorough and renewed scrutiny is justified and further reason for granting this Petition.

The reservation contained in the regulations as to the creator of a family partnership is not applicable here since a family partnership between husband and wife has existed before the creation of the trusts and has been recognized by the Commissioner. No new family partnership has therefore been formed by the Petitioners and the validity of the partnership has been expressly recognized by the tax court's clear findings of fact.

III. THE CONFLICT OF THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND WITH APPLICABLE DECISIONS OF THIS COURT ARE NOT RESOLVED BY THE REFUSAL TO REVIEW THESE DECISIONS.

The petition for writs of certiorari has set forth in detail these conflicts and they need not be repeated here.

The Petition has further stressed the importance of the question involved and the desirability of obtaining the views of this Court.

The confusion created in both jurisdiction and administration, and admitted by the Commissioner, will not be alleviated by this Court's refusal to review the instant cases.

CONCLUSION:

For the foregoing reasons, it is respectfully urged that a rehearing be granted and the order denying the Petition for Writs of Certiorari be reconsidered.

The undersigned counsel of record for the Petitioners certifies that this Petition for a rehearing is presented in good faith and not for the purpose of delay.

Respectfully submitted,

OPPIE L. HEDRICK
Counsel for Petitioners.